1986

A. Lamar Hansen v. Cynthia Ann Hansen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT STATE OF UTAH

A. LAMAR HANSEN,	:	
Plaintiff and Appellant,	:	
vs.	:	Case No. ~~860249~~ 870231
CYNTHIA ANN HANSEN,	:	Case No. 860198-CA
Defendant and Respondent.	:	

BRIEF OF DEFENDANT/RESPONDENT

FROM THE RULING OF THE UTAH COURT OF APPEALS

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CYNTHIA ANN HANSEN,	:	BRIEF OF DEFENDANT/ RESPONDENT
Defendant and Respondent.	:	

This Brief is submitted by defendant/respondent in opposition to the Petition for Writ of Certiorari presented to this Court by plaintiff/appellant.

STATEMENT OF FACTS

Plaintiff chose not to present a statement of facts. Instead he incorporated the "facts" into his argument. Defendant submits the "facts" as sprinkled through plaintiff's argument are deficient and will seek to clarify and present a complete statement thereof.

The parties were married in December, 1981 at Elko, Nevada. Aron Jim Hansen was born October 14, 1983. The defendant left the plaintiff in February, 1985. Defendant was awarded temporary custody and had the child in her custody when trial was held March 5, 1986. Thirteen (13)

witnesses testified including the parties. Several exhibits were also introduced. Home studies were prepared and submitted. The home studies were prepared by two (2) different individuals from Division of Family Services as the plaintiff resided in Duchesne, Utah and the defendant was living in Huntington, Utah. Each Division of Family Service case worker recommended custody be awarded to the spouse who was the subject of their respective study. The Division of Family Service worker who did the study concerning the plaintiff, Leann Paige, was called by the defendant to testify. Ms. Paige testified, in part, as follows:

> "(Mr. Schindler) Q. Do you recommend custody to men that you have an indication are physically abusing their wife and have a history of that?
>
> (Ms. Paige) A. If I have substantiated knowledge that that's what is taking place, then I wouldn't recommend it, no." (tr. 170.)

The Division of Family Service case worker who prepared the homestudy on the defendant did not testify.

Admitted into evidence by defendant was exhibit 20. This exhibit was the Findings of Fact and Conclusions of Law from plaintiff's first divorce. It was noted to the

trial court that paragraph 12 of the Findings of Fact stated "That due to the physical abuse inflicted on plaintiff (Deborah Kay Hansen) no reconciliation is possible."

Defendant testified that plaintiff physically abused her throughout the marriage beginning approximately three (3) months into the marriage and continuing until the defendant left the plaintiff in February, 1985 (tr. 103). Plaintiff admitted striking the defendant on four (4) ocassions (tr. 34 and 35).

In connection with the custody issue, plaintiff attempted to introduce a letter from a psychologist concerning the plaintiff. Testimony revealed that the assessment by the psychologist was after the homestudy was completed (tr. 168). The author of the letter was not present in court. The letter was objected to and not admitted, nor was it proffered into evidence.

There was substantial testimony concerning the parties' debts. Plaintiff alleged the $3,000.00 debt to his father (this is the debt to which plaintiff refers in paragraph 2 of his Questions Presented for Review in his Petition for Writ of Certiorari) was used for bail for defendant. Defendant testified that the subject $3,000.00 was

ultimately used for Christmas presents, traveling and miscellaneous household items (tr. 112).

ARGUMENT

POINT I - BASIS FOR REVIEW

Before considering the issues presented by the plaintiff for review there is, defendant submits, a threshold issue. That issue is whether the Writ of Certiorari should be granted. The plaintiff misunderstands the purpose of a petition for writ of certiorari. Although the defendant and her counsel believe that members of this Court have discussed this issue in extreme detail, neither the defendant nor her counsel have had an opportunity to make any comment in that regard. We will, therefore, take this opportunity to submit a statement in that regard.

A writ of certiorari is a discretionary writ. Bogges v. Morris, 635 P.2d 89 (Utah 1981). The purpose of a writ of certiorari is to review alleged error by an inferior tribunal. Bogges v. Morris, supra; Northwest Environmental Defense Center v. City Council for City of Portland, 20 Or. App. 234, 531 P.2d 284, appeal after remand 23 Or. App. 45, 540 P.2d 1032.

Our two (2) tiered appellate system is very new. The Court of Appeals began functioning early this year. Section 78-2a-4 U.C.A. 1953, as amended states,

> "Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court."

This new process places before this Court the issue of its role in the appellate process. We submit that this Court's role should be one of determining whether the rulings of the lower court appears to be correct on its face. Is the ruling contrary to established law? Does the ruling violate previous rulings of this Court? If so, which ones?

Defendant submits that the plaintiff fails to recognize the function of this Court. This failure is shown by the way his "Questions Presented for Review" are framed. Plaintiff says the questions are whether the Court of Appeals gave "adequate consideration" (questions 1 and 2) or "any consideration" (questions 3 and 4) to plaintiff's issues presented to the Court of Appeals.

Plaintiff argued seven (7) points in his brief to the Court of Appeals. Those seven (7) points concerned three (3) issues - custody, child support, and allocation of a $3,000.00 debt to plaintiff's father. Judge Jackson's opinion, in the first paragraph, acknowledges those three

(3) issues. The opinion goes on to analyze those three (3) issues, discuss previous rulings of this Court, cite new rules of civil procedure and reach a conclusion which is definitively stated. The opinion was prepared after a review by the participating judges of the transcript of the trial, the exhibits admitted, the briefs of the parties, applicable cases (some of the cases cited by Judge Jackson were not cited in either parties' brief), and oral argument.

I find it incongruous that plaintiff now seeks a Writ of Certiorari alleging the Court of Appeals did not give his case "adequate" or "any" consideration. Plaintiff is seeking, by his Petition, another bite of the apple. I submit this is not the purpose of this Court in the appellate process as it is presently constituted in this State.

POINT II
THE COURT OF APPEALS' RULING IS CORRECT

The Court of Appeals held,

> "We hold that the oral findings made by the trial judge at the close of the evidence are sufficient to support the custody award and demonstrate that the determination was based on factors relevant to the best interests of the Hansens' son."

In other words, the Court of Appeals said:

1. If all we had was the first Finding of Fact (paragraph 10) it would be clearly inadequate under the standard of Smith v. Smith, 726 P.2d 423 (Utah 1986). Judge Jackson wrote,

> "Under the standard enunciated in Smith and Hutchison, the one conclusory written finding quoted above, by itself, is clearly inadequate to support the custody determination."

2. We have, however, the oral comments of the trial court at the conclusion of the trial. The trial court stated at the close of the trial,

> "Custody of the child will be awarded to the defendant. The reason for that is as follows:
>
> The court finds that the defendant is the primary care-giving parent. The only thing anybody can really say bad about this party is that she has been in trouble.
>
> On the other hand, by the plaintiff's own admission he has committed, I think, six different assaults, which has got to count for something. So if they are going to start painting each other black, I think the brush will fit both. I don't find any reason to deprieve her of custody. It seems to have worked. I

> don't see anything wrong with her as a custodial parent. From the testimony that's been given here, particularly by the preschool lady, she has been working very diligently in taking care of this child, and the court finds that she is a fit and proper person and does award custody to her."

3. We can use that statement of the trial court, because of the new wording of Rule 52(a) Utah Rules of Civil Procedure, to supplement the Finding of Fact.

4. That the Finding of Fact supplemented by the statement of the trial court satisfy the requirements of Smith, supra, Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982) and cases of this Court requiring findings of fact.

Plaintiff states,

> "The heart and core of Apellant's appeal, and the central concern in this petition, is that the findings of fact which evidence the thought and reasoning process of the trial court are grossly inadequate."

"Adequacy" is a very subjective term. Had the Court of Appeals decision been eight (8) pages rather than six (6) would it then have been "adequate"? or ten (10) pages? or twenty (20) pages?

Defendant submits that adequacy is not the issue here - but rather was the ruling a proper one. Plaintiff has submitted no cases or statutes which indicate the Court of Appeals should not, or even could not, rule as they did.

We submit that the ruling of the Court of Appeals was properly based on the wording of Rule 52(a) Utah Rules of Civil Procedure. The trial court's statement was made in open court with all parties present. All parties, therefore, were informed of the trial court's decision and the reasons therefore. The plaintiff's criticisms of the trial court are unfounded.

CONCLUSION

Defendant submits the Petition for Writ of Certiorari should be denied. This denial could be for either or both of the two (2) reasons argued herein.

DATED this 4 day of September, 1987.

John E. Schindler

JOHN E. SCHINDLER, Attorney for defendant/respondent

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF CARBON)

JOHN E. SCHINDLER, being first duly sworn, says:

That he served copies of the foregoing Brief of Defendant/Respondent upon Plaintiff/Appelllant by delivering four (4) true and correct copies of the foregoing brief to Plaintiff/Appellant's attorney of record, RANDALL J. HOLMGREN, of Shields, Shields & Holmgren, 50 West Broadway, Suite 900, Salt Lake City, Utah 84101, by certified mail, return receipt requested.

John E. Schindler
JOHN E. SCHINDLER

Subscribed and sworn to before me this 24th day of September, 1987.

Hilda Preston
NOTARY PUBLIC

My Commission Expires:
November 13, 1990

Residing at:
Price, Utah